(5)

Supreme Court, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

No. 03-7434

IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI FOR BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, PENNSYLVANIA IMMIGRATION RESOURCE CENTER, MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER, OFFICE OF THE FEDERAL DEFENDER FOR THE EASTERN DISTRICT OF CALIFORNIA, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND LUTHERAN IMMIGRATION AND REFUGEE SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

G. MICHAEL HALFENGER
FOLEY & LARDNER
777 E. Wisconsin Ave.
Milwaukee, Wis. 53202

MICHAEL D. LEFFEL
FOLEY & LARDNER
150 E. Gilman St.
Madison, Wis. 53703

GEORGE E. QUILLIN
Counsel of Record
FOLEY & LARDNER
3000 K Street, N.W.
Washington, D.C. 20007-5101
(202) 672-5300

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. DUE PROCESS REQUIRES ADEQUATE PROCEDURAL SAFEGUARDS FOR INADMISSIBLE ALIENS FACED WITH INDEFINITE DETENTION. 7

A. Due Process Requires Procedures Sufficient To Protect Against The Government Unfairly Depriving Persons Of Liberty. 7

B. The Important Liberty Interest At Stake Requires That Mariel Cubans Receive Significant Procedural Protections. 8

C. The Government's Interest Lies Only In The Traditional Police Power Concern Of Preventing Danger To The Community. 10

II. THE ADMINISTRATIVE PROCEDURES FOR INDEFINITELY DETAINING MARIEL CUBANS DO NOT AFFORD ADEQUATE DUE PROCESS. 13

A. The Regulations Governing The Post-Removal Detention Of Mariel Cubans Provide Insufficient Procedural Protections. 13

TABLE OF CONTENTS—Continued

Page

B. The Government's Procedures For Deciding Whether Mariel Cubans Should Be Indefinitely Detained Do Not Withstand Due Process Scrutiny. 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. *Texas*, 441 U.S. 418 (1979) 20

Alba v. *McElroy*, No. 96 Civ. 8748 (DLC), 1996 WL 695811 (S.D.N.Y. Dec. 4, 1996) 18

Benitez v. *Wallis*, 337 F.3d 1289 (11th Cir. 2003) 10

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 19

Crowell v. *Benson*, 285 U.S. 22 (1932) 19

Cruz-Taveras v. *McElroy*, No. 96 Civ. 5068 (MBM), 1996 WL 455012 (S.D.N.Y. Aug. 13, 1996) 18

Demore v. *Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003) 10, 18

Duong v. *INS*, 118 F. Supp. 2d 1059 (S.D. Cal. 2000) 17

Ekekhor v. *Aljets*, 979 F. Supp. 640 (N.D. Ill. 1997) 18

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 9, 16, 19

Gomez-Chavez v. *Perryman*, 308 F.3d 796 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 53 (2003) 18

Kansas v. *Crane*, 534 U.S. 407 (2002) 18

Landon v. *Plasencia*, 459 U.S. 21 (1982) 7

Marcello v. *Bonds*, 349 U.S. 302 (1955) 18

Mathews v. *Diaz*, 426 U.S. 67 (1976) 7

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 6, 8

Phan v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Phillips v. *Comm'r*, 283 U.S. 589 (1931) 19

Reno v. *Flores*, 507 U.S. 292 (1993) 17

Rosales-Garcia v. *Holland*, 322 F.3d 386 (6th Cir.), *cert. denied*, 123 S. Ct. 2607 (2003) 9

Sale v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) 5

Schall v. *Martin*, 467 U.S. 253 (1984) 16, 17

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 5, 16, 17

South Carolina v. *Regan*, 465 U.S. 367 (1984) 19

St. John v. *McElroy*, 917 F. Supp. 243 (S.D.N.Y. 1996) 17

Superintendent, Mass. Correctional Institute v. *Hill*, 472 U.S. 445 (1985) 19

Thomas v. *McElroy*, No. 96 Civ. 5065 (JSM), 1996 WL. 487953 (S.D.N.Y. Aug. 27, 1996) 18

United States v. *Salerno*, 481 U.S. 739 (1987) 16, 17, 20

Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. amend. V 7

8 U.S.C. § 1101(a)(13) 5

8 U.S.C. § 1182 ..... 5, 9, 10

8 U.S.C. § 1226 9

8 U.S.C. § 1231(a)(6) ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Department of Defense Appropriation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996) 4

Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 13

8 C.F.R. § 212.12 ..... *passim*

8 C.F.R. § 241.4(b)(2) 9, 15

IN THE

Supreme Court of the United States

No. 03-7434

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI FOR BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, PENNSYLVANIA IMMIGRATION RESOURCE CENTER, MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER, OFFICE OF THE FEDERAL DEFENDER FOR THE EASTERN DISTRICT OF CALIFORNIA, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND LUTHERAN IMMIGRATION AND REFUGEE SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center is the litigation arm of the Foundation. Part of the Legal Action Center's work involves providing mentoring assistance and advice to immigration lawyers on wide-ranging immigration law issues including removal and detention.

The Pennsylvania Immigration Resource Center (PIRC) is a nonprofit, legal services organization founded in 1996 as a legal and educational resource center for immigrants in Bureau of Immigration and Customs Enforcement custody. PIRC's goal is to ensure access to justice for detained immigrants who face removal from the United States. To that end, PIRC delivers presentations, conducts pro se workshops, and provides individualized legal assistance to the detainee populations in Pennsylvania prisons. PIRC focuses its efforts on providing legal representation to particularly vulnerable immigrant populations, those populations that are typically unable to mount a successful defense against removal from the United States without representation. These populations include children, families, survivors of torture, survivors of domestic violence, and individuals with mental health concerns. In addition, PIRC provides legal assistance to detainees challenging their continued custody. Such challenges are frequently based on failures to receive requisite custody reviews or because release is constitutionally mandated.

The Midwest Immigrant and Human Rights Center (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers and

Immigrants Aid, has worked with and represented low-income immigrants since 1881, including immigrants and asylum-seekers like Mr. Benitez, who are detained by the United States Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) because they cannot be removed from the country. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in immigration courts and the federal courts, often in conjunction with local lawyers working pro bono publico. Through direct legal services and advocacy, MIHRC strives to advance local and international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

Since 1998, the Office of the Federal Defender for the Eastern District of California has been appointed to represent hundreds of individuals detained by the Bureau of Immigrations and Customs Enforcement in federal habeas corpus cases challenging such detention. A substantial percentage of these individuals are persons deemed "inadmissible" or "excludable" by federal immigration officials who cannot be removed from the United States because their countries of birth will not accept them. As part of the office's representation of these individuals, staff lawyers and paralegals have assisted numerous Mariel Cubans in attempting to gain release from detention pursuant to the Mariel Cuban Review process. It is likely that this Court's decision in the current case will have an impact on the indefinite-detainee clients that the office represents.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 8,500 members organized in thirty-five chapters across the United States and in Canada. AILA's mem-

bers' clients may be directly affected by the decision in this case.

Lutheran Immigration and Refugee Service (LIRS) is one of the nation's largest refugee resettlement agencies. In response to God's love in Christ, LIRS welcomes the stranger, bringing new hope and new life through ministries of service and justice. Through a network of twenty-seven affiliated agencies around the United States, LIRS resettles refugees, reunites families, promotes education and employment, and provides support necessary for early and continuing self-sufficiency of refugees, asylum seekers and immigrants. LIRS specializes in serving refugees, unaccompanied minors, immigrants in detention, asylees and other vulnerable populations of migrants.

Amici submit this brief to explain the inadequacies of the regulatory procedures governing the continued detention of inadmissible aliens like petitioner.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act (INA) provides that certain aliens whom the Government has ordered removed from the United States "may be detained" beyond the statutory 90-day period in which the Attorney General must attempt to secure the alien's removal. 8 U.S.C. § 1231(a)(6).[2] In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court held that for all admitted aliens, Section 1231(a)(6) must be read to limit the Government's post-removal-period detention authority to a reasonable period in order to avoid serious constitutional questions. *Id.* at 692.

These questions arose, the Court reasoned, because the Government lacked a "sufficiently strong special justification

[2] The INA was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted as Division C of the Department of Defense Appropriation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996).

for indefinite detention" of admitted aliens. *Id.* at 690. The Court so concluded because, *inter alia*, the non-citizen status of admitted aliens did not itself justify indefinite detention, *id.* at 692-96, nor did that status create a "special circumstance" that could justify "preventative detention . . . of potentially *indefinite* duration," *id.* at 691 (emphasis in original). The Court reasoned, moreover, that the line of decisions, including *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), holding that aliens "stopped at the border" have no due process right to be allowed into the country does not apply to admitted aliens who have "effected an entry into the Untied States." *Id.* at 693.

This case requires the Court to determine whether *Zadvydas*'s construction of Section 1231(a)(6) as limiting any post-removal-period detention to a reasonable time applies to "inadmissible" aliens who were paroled into the country, such as petitioner.[3] *Amici* agree with petitioner that *Zadvydas*'s interpretation of Section 1231(a)(6) should apply to him, because it is the very statute under which the Government claims authority for his detention. *Amici* further agree with petitioner that this Court should either overrule *Mezei* or limit its holding, so as not to apply to paroled aliens like petitioner who, through parole, "effected an entry" into the United States.

[3] The IIRIRA refers to "inadmissible" aliens rather than the formerly accepted phrase "excludable" aliens. "Inadmissible" aliens encompasses both aliens who have not yet entered the United States (formerly referred to as "excludable") and individuals who entered the country illegally (formerly referred to as "deportable"). An "admitted" alien has legally entered the country. 8 U.S.C. § 1101(a)(13). Permitting aliens like Mr. Benitez to enter into the country under supervised parole is not "regarded as an admission of the alien." 8 U.S.C. § 1182(d) (1994); *see also Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993). Treating inadmissible aliens who have been legally paroled into the country as not having entered it is recognized as the "entry fiction" in immigration law. *See Zadvydas*, 533 U.S. at 693 (discussing this fiction under immigration law). Throughout this brief, *amici* refer to aliens in Mr. Benitez's situation as "inadmissible paroled" or "paroled" aliens.

Amici write separately to address the due process issue that would confront this Court should it conclude that (a) paroled aliens are "persons" protected by the Due Process Clause, but nevertheless (b) the Government may detain paroled aliens pursuant to Section 1231(a)(6) for longer than a reasonable period to effect removal and may do so for reasons other than to effect removal, such as because it believes that the alien is dangerous. *Amici* argue that, should this Court so conclude, the procedures under which the Government has detained petitioner and other paroled aliens are constitutionally inadequate.

The constitutional adequacy of those procedures under these assumptions is determined by application of the due process balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (*Mathews*).

1. *Mathews* requires this Court to evaluate the constitutional adequacy of the procedures at issue in light of the paroled alien's liberty interest, the Government's interest in detaining those aliens, and the probable value of additional procedures in decreasing the risk of erroneous deprivations. Even if this Court were to conclude (as it should not) that paroled aliens' status leaves them with a diminished liberty interest or provides the Government with an enhanced interest in regulating their freedom, the deprivation of liberty by confinement is a weighty one. Consequently, *Mathews* mandates a further determination—whether additional procedures are necessary to minimize the risk of erroneous detention decisions.

2. Additional procedures would minimize this risk. This Court's cases concerning other persons who, because of their special circumstances, may be subjected to long-term civil detention, show what the Due Process Clause requires here. At a minimum, the Government must (i) provide an adversary hearing before an impartial adjudicator, (ii) make its detention determination based on a clearly articulated standard, and (iii) bear the burden of demonstrating by at least clear

and convincing evidence that the detainee meets that detention standard. Additionally, when the Government provides only administrative procedures prior to detention, it must subject those decisions to judicial review.

The Government's regulations, however, do not provide paroled aliens with these procedural protections. Thus, even if the Government's indefinite detention of paroled aliens did not otherwise violate their substantive constitutional rights, the Government has failed to afford them due process of law.

ARGUMENT

I. DUE PROCESS REQUIRES ADEQUATE PROCEDURAL SAFEGUARDS FOR INADMISSIBLE ALIENS FACED WITH INDEFINITE DETENTION.

A. Due Process Requires Procedures Sufficient To Protect Against The Government Unfairly Depriving Persons Of Liberty.

The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." U.S. Const. amend. V. Presuming that this Court recognizes that Mr. Benitez is a "person" within the meaning of this Clause, the Government must provide him with constitutionally adequate procedures if it is lawfully to deprive him of his liberty. *See Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

Whether particular procedures are constitutionally adequate depends on the circumstances. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). The inquiry requires the Court to consider, in the context of existing procedures, "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the

probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures." *Id.* (citing *Mathews*, 424 U.S. at 334-35). Ultimately, however, this Court's due process inquiry requires more than "ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Mathews,* 424 U.S. at 348.

As demonstrated below, there is a substantial risk that the Government's current procedures have erroneously deprived Mr. Benitez and other detained Mariel Cubans of their liberty. Those procedures permit the Government to detain these persons indefinitely based on a variety of factors, including past criminal conduct and suspicions of future dangerousness. They do not provide the minimal protections that this Court has required in the context of long-term civil detentions.[4] Because no legitimate governmental interest outweighs the probable value of requiring additional safeguards, and because the existing procedures create an unacceptably high risk that persons like Mr. Benitez are being imprisoned unfairly, the Government's post-removal detention procedures for inadmissible paroled aliens are constitutionally deficient.

B. The Important Liberty Interest At Stake Requires That Mariel Cubans Receive Significant Procedural Protections.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause pro-

[4] For the purposes of this analysis, *amici* presume, as this Court did in *Zadvydas,* that "[t]he proceedings at issue here are civil, not criminal, and . . . that they are nonpunitive in purpose and effect." *Zadvydas,* 533 U.S. at 690.

tects." *Zadvydas*, 533 U.S. at 690; *see also Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."). Absent a limiting construction by this Court, the federal statute and implementing regulations governing the detention of Mariel Cubans like Mr. Benitez provide no limit on how long such an individual can be detained. *See* 8 U.S.C. § 1226. The statute provides that certain inadmissible aliens, like Mr. Benitez, and certain removable aliens, like the aliens in *Zadvydas*, "may be detained beyond the [ninety-day] removal period." *Id.*[5]

The implementing regulations do not limit the length of detention, and thus Mr. Benitez's detention, like that of the aliens in *Zadvydas*, is potentially permanent.[6] As the Sixth Circuit has held, under the regulations governing detention of Mariel Cubans, "post-removal-period detainees may *only* be released on parole 'for emergent reasons or for reasons deemed strictly in the public interest.' 8 C.F.R. § 212.12(b)(1). Therefore, the likelihood that they will be detained indefinitely is much greater." *Rosales-Garcia* v.

[5] Section 1231(a)(6) provides in full:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

Mr. Benitez has been determined to be inadmissible under 8 U.S.C. § 1182.

[6] Mr. Benitez's detention is governed by the Cuban Review Plan, *see* 8 C.F.R. § 241.4(b)(2), but like the administrative regulations applicable in *Zadvydas*, there is no limit on the period of detention. *Compare* 8 C.F.R. § 241.4 (2001) *with* 8 C.F.R. § 212.12 (2004); *see also Rosales-Garcia* v. *Holland*, 322 F.3d 386, 412 (6th Cir.) (en banc) (analyzing the regulations applicable to Mariel Cubans), *cert. denied*, 123 S. Ct. 2607 (2003).

Holland, 322 F.3d 386, 412 (6th Cir.) (en banc) (emphasis in original), *cert. denied*, 123 S. Ct. 2607 (2003).

C. The Government's Interest Lies Only In The Traditional Police Power Concern Of Preventing Danger To The Community.

As the Government argued in *Zadvydas*, 8 U.S.C. § 1231(a)(6), which authorizes detention "beyond the removal period" and "release[]," "has two regulatory goals: ensuring the appearance of aliens at future immigration proceedings and [p]reventing danger to the community." 533 U.S. at 690 (internal quotation marks omitted). Neither goal is sufficient to support the detention of Mr. Benitez and similarly situated Mariel Cubans without greater procedural protections than those currently afforded such detainees under 8 C.F.R. § 212.12.

This Court has concluded that the first goal—ensuring the alien's appearance at future proceedings—should be afforded little weight when chances of the alien's removal are slim: "[B]y definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best." *Zadvydas*, 533 U.S. at 690. Because there is little chance that the Government will be able to remove persons like Mr. Benitez, it does not have a substantial interest in detaining those persons to ensure that they are available to be removed. *Id.*

The unremovable nature of persons like Mr. Benitez also diminishes the broad general interest in controlling immigration policy ordinarily enjoyed by the political branches. *Cf. Demore* v. *Kim*, 538 U.S. 510, ---, 123 S. Ct. 1708, 1716 (2003) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" (internal quotation marks omitted)). As the Court of Appeals recognized, Mr. Benitez, like other Mariel Cubans, cannot be removed "if his own country will not allow it." *Benitez* v. *Wallis*, 337

F.3d 1289, 1300 (11th Cir. 2003). Since this state of affairs is likely to persist for some time, Mr. Benitez and other Mariel Cubans are probably going to continue living in this country, as they have for the last twenty years. Under these circumstances, Government detention decisions are predictably far less about policies implicating foreign relations, the war power, or maintenance of a republican form of government, than about domestic policy and community protection. *Cf. Zadvydas,* 533 U.S. at 696.

In fact, the regulations governing when parole will be extended to Mariel Cubans like Mr. Benitez illustrate that the Government's interest is principally focused on whether the alien is, in the Government's view, dangerous. Parole can only be recommended if the Director or the Cuban Review Panel determines that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

In making these determinations, the regulations require that the Director and Review Panel consider the following laundry list of factors:

> (i) The nature and number of disciplinary infractions or incident reports received while in custody;
>
> (ii) The detainee's past history of criminal behavior;
>
> (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;
>
> (iv) Institutional progress relating to participation in work, educational and vocational programs;
>
> (v) His ties to the United States, such as the number of close relatives residing lawfully here;

> (vi) The likelihood that he may abscond, such as from any sponsorship program; and
>
> (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

8 C.F.R. § 212.12(d)(3).

These factors' plain focus is on whether the alien, if released, will endanger the community. In substantial part, they suggest that the Government decides whether the alien, if released, is likely to be dangerous based on the alien's "past history of criminal behavior," "disciplinary infractions or incident reports," "psychiatric and psychological reports," and on whether he is "likely to engage in future acts of violence[or] is likely to engage in future criminal activity."

The Government's detention regulation thus emphasizes that its decisions regarding whether to parole or detain Mariel Cubans like Mr. Benitez are most likely premised on considerations of community protection—the statute's second goal. Community protection alone, however, provides an insufficient Government interest to justify indefinite detention. This Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 691. As was the case in *Zadvydas*, "[t]here is no sufficiently strong special justification here for indefinite civil detention." *Id.* at 690.

In fact, the Government has not suggested a "strong special justification" or attempted to limit its indefinite detention of inadmissible aliens to those that are "specially dangerous individuals." Thus, even if these detentions can properly be viewed as nonpunitive (therefore civil rather than criminal), they should be held to offend the Constitution for the reasons stated in *Zadvydas*. *Id.* at 690-92.

At all events, this Court has consistently required the Government to provide robust procedural protections before detaining persons based on dangerousness. Thus, even if this Court concluded that the Government has greater authority to detain inadmissible aliens who it believes are "dangerous," and, therefore, that this case is not wholly on par with *Zadvydas*, that conclusion would be insufficient to relieve the Government of its duty to afford those aliens strong protections. For the reasons discussed below, the Government's existing detention scheme is constitutionally inadequate because it fails to provide minimally necessary procedures.

II. THE ADMINISTRATIVE PROCEDURES FOR INDEFINITELY DETAINING MARIEL CUBANS DO NOT AFFORD ADEQUATE DUE PROCESS.

A. The Regulations Governing The Post-Removal Detention Of Mariel Cubans Provide Insufficient Procedural Protections.

Once an inadmissible Mariel Cuban such as Mr. Benitez has been detained and ordered removed from the country, whether he will be granted supervised release or detained indefinitely is determined "by the Commissioner, acting through the Associate Commissioner for Enforcement." 8 C.F.R. § 212.12(b). Recommendations to the Associate Commissioner for Enforcement, or his designee, are made by a "Cuban Review Panel," consisting of "two persons" selected by the Director of the Cuban Review Plan, himself appointed by the Associate Commissioner for Enforcement. The members of the Cuban Review Panel are selected from the staff of the Bureau of Immigration and Customs Enforcement (ICE). *See* 8 C.F.R. § 212.12(d)(1).[7] If the two

---

[7] On March 1, 2003, the Immigration and Naturalization Service (INS) was replaced by ICE, an agency within the newly created Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. § 251(2)).

ICE staff members cannot reach a unanimous recommendation, a third member is added to the Panel, either the Director or his designee who must also be an ICE staff member. *Id.*

To determine whether to recommend parole, the Cuban Review Panel or the Director initially reviews the detainee's paper files, which the Director establishes and maintains, *see* 8 C.F.R. § 212.12(c), (d)(4)(1), and applies the criteria described above, *see* 8 C.F.R. § 212.12(d)(2).

If parole is not recommended based on the review of the detainee's file, or if the recommendation for parole is rejected, then the detainee is "personally interview[ed]" by the Panel. 8 C.F.R. § 212.12(d)(4)(ii). The regulations do not require the Government to provide counsel to the detainees for these interviews. *Id.*[8] Although the regulations permit the detainee to submit oral or written information pertinent to his parole determination, they do not afford him the right to subpoena witnesses or other evidence. *Id.* The regulations also do not afford the detainee an opportunity to review the Government's evidence or his file. *Id.* Nor do they provide him an opportunity to cross-examine witnesses. *Id.*

In determining whether the Panel will recommend to the Associate Commissioner of Enforcement that the detainee should be paroled after a personal interview, the regulations direct the Panel to apply the same criteria and factors as those used in the initial review of the paper record. *See* 8 C.F.R. § 212.12(d)(2).

The regulations thus leave to immigration staff the task of applying the various criteria and factors in Section 212.12(d) to reach a conclusion regarding whether the alien should be paroled. And, although the regulations for Mariel

---

Throughout this brief, *amici* refer to ICE and the Government interchangeably.

[8] Based on the *amici*'s experience, although detainees are entitled to have counsel present at interviews, in practice this is often difficult to obtain.

Cubans do not expressly address the burden or standard of proof, the Government has argued below that the procedures are similar to the procedures at issue in *Zadvydas*; those procedures expressly placed the burden on the detainees to demonstrate they should be paroled. *See* 8 C.F.R. § 241.4(d)(1); Respondent's Brief, Case No. 02-14324-BB, at p. 10 n.12. Moreover, based on *amici*'s experience, the Government in practice requires detained Mariel Cubans to bear the burden of proof.

Most importantly, as was the case with Mr. Benitez's review, regardless of whether the Panel recommends parole, the Associate Commissioner for Enforcement (or his designee) has complete discretion to deny parole. Nothing in the administrative procedures requires the Associate Commissioner to follow the recommendation. In fact, the procedures only state that he "*may, in the exercise of discretion*, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest." *See* 8 C.F.R. § 212.12(b)(1) (emphasis added). Detainees who have been denied parole are not entitled to another parole review for a full year following the denial. *See* 8 C.F.R. § 212.12(g)(2). And, even if parole is granted, "[t]he Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, *or any other circumstance*, indicates that parole would no longer be appropriate." 8 C.F.R. § 212.12(e) (emphasis added).

B. The Government's Procedures For Deciding Whether Mariel Cubans Should Be Indefinitely Detained Do Not Withstand Due Process Scrutiny.

These procedures that the Government employs to decide whether it will indefinitely detain Mariel Cubans based on the regulations' various factors—the focus of which are on whether the alien is likely to commit crimes or endanger

the community if released—are constitutionally inadequate even presuming this Court concludes (as it need not and should not) that Mariel Cubans have a diminished liberty interest or that the Government has a heightened interest in curtailing their liberty. As Justice Jackson aptly remarked, "basic fairness in hearing procedures does not vary with the status of the accused." *Mezei*, 345 U.S. at 225 (Jackson, J., dissenting).

Regardless, the Government's detention procedures are deficient because they do not meet the minimum protections that this Court has held are constitutionally required when the Government subjects even those persons who present a special danger to themselves or to their community to long-term civil detentions. Those constitutionally-required minimum protections include the following.

Adversary hearing before an impartial adjudicator. This Court has consistently held that full adversary hearings before impartial adjudicators must be afforded persons threatened with indefinite civil detention. For example, in *Foucha*, 504 U.S. at 72, this Court held unconstitutional the detention of an insanity acquittee who was no longer mentally ill but remained dangerous. The Court stated that the procedural protections were "not carefully limited" at least in part because the detainee was "not ... entitled to an adversary hearing." *Id.* at 81; *see also Schall* v. *Martin*, 467 U.S. 253 (1984) (upholding civil confinement of juveniles under statute that allowed for full adversarial hearings within three days of initial detention).

Inadmissible aliens are not afforded full adversary hearings. Although they are permitted to submit information, they do not have the opportunity to subpoena witnesses or cross-examine adverse witnesses. *Compare United States* v. *Salerno*, 481 U.S. 739 (1987) (adult pre-trial detention statute that, *inter alia*, provided detainees the opportunity to testify and present witnesses, proffer evidence, and cross-examine other witnesses satisfied due process requirements). These

opportunities are constitutionally required. *See Mezei*, 345 U.S. at 225 ("The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed.") (Jackson, J., dissenting).

Mariel Cubans are also not afforded the opportunity to have their parole eligibility determined by an impartial adjudicator. An impartial decision maker is a due process touchstone. *See, e.g.*, *Salerno*, 481 U.S. at 742 (statute providing right to hearing before an impartial adjudicator); *Schall*, 467 U.S. at 270 (hearing before impartial family court judge); *Reno* v. *Flores*, 507 U.S. 292, 308 (1993) (upholding INS custody of alien juveniles prior to deportation hearings where detainee had right to custody hearing before an immigration judge). The persons who decide whether Mariel Cubans are eligible for parole cannot be presumed to be impartial. Those decisions are made by ICE officers—Cuban Review Panel members and the Associate Commissioner for Enforcement, or his designee.

Indeed, a number of federal courts have held that such officers are not sufficiently impartial because of political and community pressure to detain aliens with criminal histories. *See Phan* v. *Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) (en banc) ("Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community." (quoting *St. John* v. *McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996)), *aff'd on other grounds*, *Zadvydas*, 533 U.S. 678.[9] Many of these courts have concluded that, as with

---

[9] *See also, e.g.*, *Duong* v. *INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000) (Finding due process violation based, *inter alia*, on "fact that the final decision of whether to release the alien is made by the INS Dis-

the decision to continue the detention of Mr. Benitez, immigration officers "simply relied on the aliens' past criminal history and the fact that they were facing removal from the United States, summarily concluding that the aliens posed such risks and denying them release." *Phan*, 56 F. Supp. 2d at 1157; *see also* cases cited *supra* note 9.[10]

Clear standard permitting judicial review. Due process requires that detention decisions be based on application of a clear standard. *Cf. Kansas* v. *Crane*, 534 U.S. 407, 413 (2002) (holding that individual could be subject to involuntary commitment only if the Government shows mental con-

---

trict Director instead of an impartial party such as a judge or jury"); *Ekekhor* v. *Aljets*, 979 F. Supp. 640, 644 (N.D. Ill. 1997) (noting bias by INS officials and finding due process violation); *Alba* v. *McElroy*, No. 96 Civ. 8748 (DLC), 1996 WL 695811, at *3 (S.D.N.Y. Dec. 4, 1996) (requiring a parole hearing before an impartial adjudicator with an "unbiased view"); *Thomas* v. *McElroy*, No. 96 Civ. 5065 (JSM), 1996 WL 487953, at *3 (S.D.N.Y. Aug. 27, 1996) (noting the potential partiality of INS officials and calling for a parole hearing before an "impartial adjudicator"); *Cruz-Taveras* v. *McElroy*, No. 96 Civ. 5068 (MBM), 1996 WL 455012, at *4 (S.D.N.Y. Aug. 13, 1996) (noting "little confidence" that alien was afforded due process and requiring "a hearing before an impartial Immigration Judge").

[10] The Seventh Circuit has suggested that *Marcello* v. *Bonds*, 349 U.S. 302 (1955), stands for the proposition that there is no presumption of bias for any immigration officer. *See Gomez-Chavez* v. *Perryman*, 308 F.3d 796 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 53 (2003). In *Marcello*, this Court rejected a due process challenge where Congress had clearly created a "specially adapted" system that balanced the interests of the Government with the obligation of fairness to the immigrant. *Marcello*, 349 U.S. at 310. The procedures included among other things, a requirement "that decisions of deportability be based upon reasonable, substantial and probative evidence"; evidentiary procedures that guaranteed a meaningful right to be heard; and a right to appeal. *Id.* at 307-10 (quotation marks and citations omitted). Unlike here, the case did not involve indefinite detention decisions made by officials with unbridled discretion. *Cf. Demore*, 123 S. Ct. at 1726 (Souter, J., concurring in part and dissenting in part) (noting in case involving alien's due process claim that in that case "there is no occasion to enquire whether due process requires access to any particular arbiter, such as one unaffiliated with the INS").

dition resulting in serious difficulty in the individual controlling dangerous behavior). Indeed, in the absence of a clear standard, the Government's detention determinations may be wholly arbitrary and effectively unreviewable. *Cf. City of Chicago* v. *Morales*, 527 U.S. 41 (1999) (due process requires minimum guidelines to prevent arbitrary and discriminatory enforcement).

Here, where detention determinations are made in the first instance by an administrative body, those determinations must be subject to meaningful judicial review. As this Court stated in *Zadvydas*, "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692 (quoting *Superintendent, Mass. Correctional Inst.* v. *Hill*, 472 U.S. 445, 450 (1985), and citing *Crowell* v. *Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.")). "The Constitution demands greater procedural protection even for property." *Zadvydas*, 533 U.S. at 692 (citing *South Carolina* v. *Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., concurring in judgment); *Phillips* v. *Comm'r*, 283 U.S. 589, 595-97 (1931) (Brandeis, J.)).

Meaningful judicial review—even the limited review that the Government asserts is the only review available—is impossible in the absence of a hearing resulting in a written decision applying an articulated standard. In the absence of these procedures, any review would, at best, be limited to whether immigration officials abused their discretion in levying what could effectively be a life sentence.

Government's burden of proof. Finally, in the civil detention context, this Court has repeatedly held that due process requires that the Government bear the burden of demonstrating by at least clear and convincing evidence that the detainee meets the detention requirements. *See Foucha*, 504 U.S. at 81-82 (detention of insanity acquittee violated due

process because, *inter alia,* statute placed burden on detainee to prove that he was not dangerous); *Addington* v. *Texas*, 441 U.S. 418 (1979) (due process requires a clear and convincing evidence standard before an individual may be detained under civil confinement); *cf. Salerno,* 481 U.S. at 742 (referencing the clear and convincing evidence standard in upholding adult pre-trial detention statute).

By contrast, as noted above, detained Mariel Cubans have the burden of proving they should not be detained. This requirement alone renders the available procedures constitutionally defective. As this Court stated in *Zadvydas*, where the burden is on the detainee to demonstrate that his release on parole is justified, a serious constitutional question arises. *Zadvydas*, 533 U.S. at 692. As noted above, even were the burden the Government's, the Associate Commissioner has complete discretion to ignore any results of the review process and continue the detention of the alien. This discretion effectively eliminates any burden on the Government to demonstrate that detained Mariel Cubans meet an articulated standard believed to justify their detention for reasons other than effecting their removal.

Ultimately, this Court must determine what process is due by weighing (a) the interest of inadmissible aliens, like Mr. Benitez, in supervised release instead of indefinite detention, where there is little likelihood of removal to another country, against (b) the Government's interest in keeping such individuals in indefinite, perhaps permanent, detention. *Amici* respectfully submit that, based on the significant deprivation of liberty suffered by these aliens compared to the Government's limited interest in detention, the Due Process Clause requires procedural protections that are far closer to those that this Court has traditionally found necessary to justify civil confinement. There is no sound precedent for holding that the procedures applicable to detained Mariel Cubans like Mr. Benitez afford due process of law.

CONCLUSION

For these reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

G. MICHAEL HALFENGER
FOLEY & LARDNER
777 E. Wisconsin Ave.
Milwaukee, Wis. 53202

MICHAEL D. LEFFEL
FOLEY & LARDNER
150 E. Gilman St.
Madison, Wis. 53703

GEORGE E. QUILLIN
Counsel of Record
FOLEY & LARDNER
3000 K Street, N.W.
Washington, D.C. 20007-5101
(202) 672-5300

Counsel for Amici Curiae

FEBRUARY 2004